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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 OLGA LILIA TOSCANO,) SA CV 12-00078 AHS
12 Defendant/Petitioner,) SA CR 04-00281 AHS
13 v.) ORDER GRANTING MOTION TO
14 UNITED STATES OF AMERICA,) REOPEN TIME TO APPEAL [ECF
15 Plaintiff/Respondent.) NO. 491]
16 _____)

17 I.

18 PROCEDURAL BACKGROUND

19 On January 17, 2012, Olga Lilia Toscano ("Petitioner")
20 filed a Motion to Vacate, Set Aside or Correct Sentence pursuant
21 to 28 U.S.C. § 2255 ("2255 Motion"). The Court entered an Order
22 Denying Petitioner's 2255 Motion on September 10, 2012. (ECF No.
23 490.)¹ On December 3, 2012, Petitioner filed a notice of appeal
24 of the September 10, 2012 Order and requested a certificate of
25 appealability. (ECF No. 491.) The Court denied Petitioner's
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27 ¹ References to ECF documents are to the docket of
28 Petitioner's criminal case, Case No. SA CR 04-00281 AHS.

1 request for a certificate of appealability on January 11, 2013.
2 (ECF No. 495.) On January 25, 2013, the United States Court of
3 Appeals for the Ninth Circuit issued an order remanding
4 Petitioner's case with instructions to construe the notice of
5 appeal as a motion to reopen time to appeal pursuant to Federal
6 Rule of Appellate Procedure 4(a)(6) ("Rule 4(a)(6)"), in
7 accordance with the holding of United States v. Withers, 638 F.3d
8 1055, 1061 (9th Cir. 2011). Petitioner's case was remanded to
9 this Court for the limited purpose of determining whether
10 Petitioner's Motion to Reopen Time to Appeal² was timely, and, if
11 so, whether it should be granted.³

12 The Court finds Petitioner's Motion was timely and
13 grants her request to reopen time to appeal.

14 II.

15 FACTUAL HISTORY

16 Petitioner is currently incarcerated at the Federal
17 Correctional Institution in Dublin, California ("FCI Dublin").
18 (See Pet'r's Mot., ECF No. 491.) According to Petitioner, she
19 had been temporarily relocated to a different facility to provide
20 testimony for the State of California in a state proceeding and
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22 ² In accordance with the Ninth Circuit's direction on
23 remand, the document filed by Petitioner entitled "Notice of
24 Appeal and Request for Certificate of Appealability" will be
25 referred to herein as "Petitioner's Motion to Reopen Time to
Appeal" or "Petitioner's Motion."

26 ³ The remand order also requested that the Court rule on
27 Petitioner's certificate of appealability. An order denying
28 Petitioner's request for a certificate of appealability was
entered on January 11, 2013. (ECF No. 495.) A copy of the
January 11, 2013 Order is attached for ease of reference.

1 was "just recently" returned to FCI Dublin. Petitioner claims
2 that during her time away from FCI Dublin her mail was not being
3 forwarded (or there was a delay in forwarding it) and she did not
4 have access to her legal documents or personal belongings. As of
5 the date of Petitioner's Motion, November 29, 2012, she "had just
6 been returned" to FCI Dublin and up to that point she was not
7 aware of the September 10, 2012 Order denying her 2255 Motion.

8 **III.**

9 **DISCUSSION**

10 A party may move the district court to reopen time to
11 appeal within 180 days after the entry of the judgment or order
12 sought to be appealed or within 14 days after the moving party
13 receives notice of the entry, whichever is earlier. Fed. R. App.
14 P. 4(a)(6)(B). Given Petitioner's representation that she did
15 not receive notice of the September 10, 2012 Order until
16 approximately November 29, 2012, her Motion, filed 4 days later
17 on December 3, 2012, was timely filed within the 14-day period
18 required by Rule 4(a)(6).

19 A motion to reopen time to appeal may be granted if the
20 moving party did not receive notice of the order within 21 days
21 after entry and no party would be prejudiced by reopening time.
22 Fed. R. App. P. 4(a)(6). On the strength of Petitioner's
23 unchallenged assertion that she did not receive notice of the
24 September 10, 2012 Order until she was returned to FCI Dublin on
25 or about November 29, 2012, the Court finds that Petitioner did
26 not receive notice of the Order within 21 days after it was
27 entered.

28 The Court also finds that no party will be prejudiced

1 by reopening Petitioner's time to appeal. "Prejudice," for the
2 purpose of a motion to reopen time under Rule 4(a)(6), requires
3 some special adverse consequence to the opposing party beyond the
4 cost and risk inherently involved in opposing an appeal. See
5 Fed. R. App. P. 4(a)(6) advisory committee's note. Reopening
6 Petitioner's time to appeal will not result in any special
7 adverse consequence to the Government other than the cost and
8 risk involved in defending the appeal. The Court finds that the
9 Government will not be prejudiced by reopening Petitioner's time
10 to appeal within the meaning of Rule 4(a)(6).

11 **IV.**

12 **CONCLUSION**

13 For the foregoing reasons, the Court finds that
14 Petitioner has met the conditions under Rule 4(a)(6) and grants
15 Petitioner's Motion to Reopen Time to Appeal. Pursuant to the
16 January 25, 2013 remand order, Petitioner does not need to file a
17 new notice of appeal. The briefing schedule will be set by the
18 Court of Appeals.

19 IT IS SO ORDERED. It is further ordered that the Clerk
20 shall serve a copy of this Order on counsel for all parties and
21 on Petitioner at her last known address and provide a copy to the
22 Clerk for the Court of Appeals in Case No. 12-57323.

23 DATED: February 13, 2013.

24
25 **ALICEMARIE H. STOTLER**

26 **ALICEMARIE H. STOTLER**
27 **UNITED STATES DISTRICT JUDGE**
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

OLGA LILIA TOSCANO,)	SA CV 12-00078 AHS
)	SA CR 04-00281 AHS
Petitioner,)	
)	
v.)	ORDER DENYING CERTIFICATE OF
)	APPEALABILITY
UNITED STATES OF AMERICA,)	
)	
Respondant.)	
_____)	

On December 3, 2012, petitioner filed a Notice of Appeal and Request for Certificate of Appealability. Upon review of petitioner's case, the Court finds that the request must be denied. The Court therefore denies the request for issuance of certificate of appealability. See 28 U.S.C. § 2253(c)(2).

The Clerk shall serve a copy of the Order on counsel for all parties and petitioner at her last know place of incarceration.

IT IS SO ORDERED

DATED: January 11, 2013

ALICEMARIE H. STOTLER

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE